

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0651

JERALD DAVIS COCKRELL,

Petitioner and Appellant,

v.

STATE OF MONTANA, DEPARTMENT OF JUSTICE,
DRIVER'S LICENSE BUREAU,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable James A. Haynes, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
MICHEAL S. WELLENSTEIN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DAVID E. STENERSON
Stenerson Law Office, P.C.
P.O. Box 2105
Hamilton, MT 59840-2105

ATTORNEY FOR PETITIONER
AND APPELLANT

JEFFREY B. HAYS
Stevensville City Attorney
716 South First Street
Hamilton, MT 59840

ATTORNEYS FOR RESPONDENT
AND APPELLEE

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STATEMENT OF THE ISSUE

Did the district court correctly find that Officer Ray had particularized suspicion to conduct an investigative traffic stop of Cockrell's vehicle after Cockrell committed a traffic violation?

STATEMENT OF THE CASE

On July 24, 2009, Jerald Davis Cockrell (Cockrell) filed a petition challenging the suspension of his driver's license. (D.C. Doc. 1.) On October 21, 2009, the district court conducted a hearing on the petition. Cockrell only challenged whether the arresting officer had particularized suspicion to conduct the traffic stop of his vehicle. Cockrell requested the district court to consider only what occurred prior to the traffic stop. Cockrell objected to the arresting officer's testifying about his observations of Cockrell's intoxication after he approached Cockrell's vehicle. (Tr. at 7-9.) The testimony at the hearing was limited to what occurred prior to the traffic stop.

On December 8, 2009, the district court issued a written order denying the reinstatement of Cockrell's license. (D.C. Doc. 17, attached as App A.) The district court concluded that the arresting officer had particularized suspicion to stop Cockrell's vehicle because Cockrell violated Mont. Code Ann. § 61-8-321 ("Driving on the right side of roadway") when the arresting officer observed

Cockrell make two right hand turns so wide that Cockrell's vehicle crossed into the other and wrong lane of traffic. (App. A at 5-6.) While the district court concluded that the two wide turns alone established objective data from which the arresting officer could infer and investigate a violation of traffic safety laws, the district court further emphasized that Cockrell's overly cautious stopping his vehicle in the middle of two intersections further buttressed the court's conclusion that the arresting officer had particularized suspicion to stop Cockrell's vehicle. Id. at 6.

STATEMENT OF THE FACTS

On July 18, 2009, at approximately 11:20 p.m., Cockrell backed his car out of an angled parking space on Main Street in Stevensville, and then traveled south on Main Street. (Tr. at 4, 48-49.) Stevensville Police Officer Josh Ray was also driving south on Main Street at that time. Officer Ray saw Cockrell's vehicle straddle the white fog line on Main Street. (Tr. at 4-5.)

Officer Ray's patrol car was not equipped with a video camera. Officer Ray had a video camera on the microphone that he wears on the front of his uniform. That camera provides some video capability, and Officer Ray turned on the video camera after Cockrell's vehicle came off the fog line. (Resp't Ex. 1; Tr. at 9-10.)

After coming off the fog line, Cockrell's vehicle approached the stop sign at the intersection of Main Street and Third Street. Cockrell stopped at the intersection, turned on his right turn signal, and turned west onto Third Street. (Tr. at 5, 15; Resp't Ex. 1.) Officer Ray testified that Cockrell made a very wide right hand turn onto Third Street and that Cockrell's vehicle crossed over the center of the road way and fully over onto the opposite side of the roadway. (Tr. at 5, 13.) Officer Ray's video camera recorded Cockrell's wide right hand turn. (Resp't Ex. 1.) Cockrell turned so wide that his vehicle touched the parking stalls on Third Street. (Tr. at 15-16.) Officer Ray testified that wide turns are a sign that he uses for DUI investigations. (Tr. at 23.) Based on his training and experience, Officer Ray offered the following explanation for why wide turns are a DUI indicator:

When a person has a certain amount of alcohol in their system, their judgment is off. That is just one sign of impairment, is a wide turn into the other lane, because they're not--Their motion is not as quick as others, so the turning of the wheel is a lot slower. They're making a wide turn.

(Tr. at 25.)

After Cockrell made the wide turn onto Third Street, Cockrell pulled his vehicle back into the correct lane of travel, and Officer Ray continued to follow Cockrell west on Third Street. (Tr. at 5; Resp't Ex. 1.) At the intersection of Third Street and Mission Street, Cockrell turned left and proceed south on Mission Street.

(Tr. at 5, 21; Resp't Ex. 1; App. A. at 2.) There is a yield sign where Mission Street intersects another street. As Cockrell approached the intersection and the yield sign, he slowed down, but his vehicle did not come to a complete stop until the middle of the intersection. (Tr. at 5, 13, 22; Resp't Ex. 1.) Officer Ray testified that it is not normal for a driver to stop in the middle of an intersection, and that Cockrell's unusual driving raised his DUI suspicion. (Tr. at 26.)

After stopping in the middle of the intersection, Cockrell continued south on Mission Street to the intersection of Mission Street and Ravalli Street. There was also a yield sign at this intersection. (App. A at 2; Tr. at 5, 13, 22; Resp't Ex. 1.) Cockrell again stopped in the middle of the intersection. Id. After he stopped in the intersection, Cockrell made a wide right hand turn onto Ravalli Street. Officer Ray testified that Cockrell's vehicle turned so wide onto Ravalli Street it went into the opposite lane of travel almost touching the grass of a residence on the south side of the road. (Tr. at 5-6; Resp't Ex. 1.) After Cockrell turned onto Charlo Street, Officer Ray initiated a traffic stop of Cockrell's vehicle. (Tr. at 5; Resp't Ex. 1.)

At his hearing, Cockrell called private investigator William Buzzell. Prior to working as private investigator, Buzzell had been a law enforcement officer for 20 years. (Tr. at 28.) Buzzell is full-time employee of the public defender's office, and he also has a private practice. At the hearing, he was testifying in his private capacity. Id. Buzzell agreed that a person driving a vehicle on the wrong side of

the road is a traffic violation and that a law enforcement officer has the right to stop a vehicle if he observes a violation of the law.

Q. Mr. Buzzell, as a former law enforcement officer, you're familiar with basic traffic regulations?

A. I am.

Q. You're familiar, of course, that it is a traffic infraction to drive on the opposite side of the roadway, correct, except when passing another vehicle or some other limited circumstance?

A. Yeah, absent some reason.

Q. Okay. So if Officer Ray testified that he observed Mr. Cockrell's vehicle twice driving on the opposite side of the roadway when he's making these right-hand turns, that would be a traffic infraction; correct?

A. I guess strictly by the letter of the question you're asking me, yes. But--

Q. Under Montana law, a law enforcement officer has a right to make a stop of a vehicle if he observes that vehicle violating the law; correct?

A. Right.

(Tr. at 35-36.)

As far as his first right hand turn at the intersection of Main Street and Third Street, Cockrell admitted there were no obstructions of his view and, although he denied doing so, he testified there would be no reason for a driver to make a turn so wide so as to drive into the opposite lane of traffic.

Q. Mr. Cockrell, we're concerned with the two right-hand turns. We're not concerned with the left-hand turn that you made from Third onto Mission. On that first right-hand turn from Main Street onto Third Street going west, there are no obstructions that would obscure your view in making that right-hand turn, seeing to the right and seeing if there's traffic or where you're going to go to make that turn, is there?

A. No sir.

....

Q. Yes. There would be no reason, given the view that you have, the lack of obstructions in that area, for a driver making a right-hand turn, such as you did on this night, to drive into the opposite lane of travel into the area that would be considered the parking area of the drug store?

A. Well, there would be no reason to do that, but I didn't do that.

(Tr. at 45.) Although Cockrell admitted to having a couple of beers in a bar prior to the stop, he denied that his recollection of the events might be little obscured or impaired as a result of his drinking. (Tr. at 46.) Cockrell also denied making a second right hand turn from Mission Street onto Ravalli Street that was so wide that he drove in the opposite lane of traffic. Id.

SUMMARY OF THE ARGUMENT

A statutory violation alone is sufficient to establish particularized suspicion for an officer to make a traffic stop. Here, the district court correctly found that Officer Ray's observations of Cockrell driving on the wrong half of the road after

Cockrell made two extremely wide right hand turns established a statutory violation of Mont. Code Ann. § 61-8-321. Cockrell's violation of Mont. Code Ann. § 61-8-321 provided Officer Ray with the necessary particularized suspicion to conduct an investigative stop of Cockrell's vehicle. Cockrell has not overcome the presumption of correctness accorded the suspension of his driver's license and has not met his burden to show that the State's action was improper.

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED COCKRELL'S PETITION FOR REINSTATEMENT OF HIS DRIVER'S LICENSE.

A. Standard of Review and Applicable Law

This Court reviews a district court's ruling on a petition for reinstatement of a driver's license to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. Brown v. State, 2009 MT 64, ¶ 8, 349 Mont. 408, 203 P.3d 842. In addition, "[b]ecause the suspension of a driver's license is presumed to be correct, the petitioner bears the burden of proving that the State's action was improper." Id.

A person driving, or in actual physical control, of a vehicle on ways of Montana open to the public is considered to have given consent to a blood or breath test. Mont. Code Ann. § 61-8-402(1). A test of a person's blood or breath

to determine the presence of alcohol or drugs must be administered when a peace officer:

has reasonable grounds to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401.

Mont. Code Ann. § 61-8-402(2)(a)(i). If a person arrested for DUI refuses to submit to a test, the arresting officer must seize the person's driver's license and the license will be administratively suspended for a statutory period of time.

Mont. Code Ann. §§ 61-8-402(4), (6).

A person whose license is seized and suspended, may file a petition in the district court challenging the suspension. Mont. Code Ann. § 61-8-403(1). In such a proceeding, the issues to be addressed by the district court are limited, as prescribed in Mont. Code Ann. § 61-8-403(4). Muri v. State, 2004 MT 192, ¶ 8, 322 Mont. 219, 95 P.3d 149. In this case, the issues are whether:

a peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person was placed under arrest for violation of 61-8-401.

Mont. Code Ann. § 61-8-403(4)(a)(i). When interpreting **subsection (i)** of Mont. Code Ann. § 61-8-403(a), the district court ruling on a petition to reinstate a driver's license must determine: (1) whether the arresting officer had reasonable

grounds to believe the petitioner had been driving or was in actual physical control of a vehicle upon a way of the state open to the public while under the influence of drugs or alcohol; and (2) whether the petitioner was lawfully under arrest. Muri, ¶ 9.

This Court has held that the “reasonable grounds” requirement in Mont. Code Ann. § 61-8-403(a)(i), is the equivalent of a “particularized suspicion” to make an investigative stop as provided in Mont. Code Ann. § 46-5-401. Brown, ¶ 11; Muri, ¶ 9. Montana Code Annotated § 46-5-401(1) authorizes an officer to conduct an investigative stop of “any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing or is about to commit an offense.”

Accordingly, “for a peace officer to have particularized suspicion or reasonable grounds for an investigatory stop, the peace officer must be possessed of:

(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.” Brown, ¶ 20.

Particularized suspicion does not require a law enforcement officer, before making an investigative stop, to possess proof beyond a reasonable doubt that a crime has been committed, to the exclusion of every possible innocent explanation or legal exception. State v. Hatler, 2001 MT 38, ¶ 11, 304 Mont. 211, 19 P.3d 822. Whether a particularized suspicion exists is a question of fact that depends on the

totality of the circumstances at the time of the stop. State v. Gouras, 2004 MT 329, ¶ 15, 324 Mont. 130, 102 P.3d 27.

In the instant case, Cockrell argues only that the district court wrongly found that Officer Ray had particularized suspicion to make the initial traffic stop. Cockrell does not challenge the lawfulness of his arrest or that he refused to take a blood test. In the district court, Cockrell even objected to the district court hearing any testimony from Officer Ray regarding his observations of Cockrell's intoxication after he approached Cockrell's vehicle.

B. The District Court Correctly Found That Officer Ray Had Particularized Suspicion to Stop Cockrell's Vehicle.

As this Court has stated, “[a] statutory violation alone is sufficient to establish particularized suspicion for an officer to make a traffic stop.” State v. Schulke, 2005 MT 77, ¶ 16, 326 Mont. 390, 109 P.3d 744; accord State v. Thompson, 2006 MT 274, ¶ 12, 334 Mont. 226, 146 P.3d 756. In addition, this Court does “not require an investigating officer to identify a particular statutory violation and/or cite a defendant for a moving violation to establish a particularized suspicion.” Schulke, ¶ 18; see also State v. Waite, 2006 MT 216, ¶¶ 14-15, 333 Mont. 365, 143 P.3d 116.

Montana Code Annotated § 61-8-321 provides in part: “Upon all roadways of sufficient width, a vehicle must operate upon the right half of the roadway”¹

Here, the district court correctly found that Officer Ray’s observations of Cockrell driving on the wrong half of the road after Cockrell made two extremely wide right hand turns established a statutory violation of Mont. Code Ann. § 61-8-321.

(App. A at 5-6.) The district court’s finding was not only supported by Officer Ray’s observation, but also by Cockrell’s own witness, private investigator William Buzzell. Buzzell, a former law enforcement officer, agreed that Officer Ray’s observing Cockrell’s vehicle driving on the opposite side of the roadway would constitute a traffic violation, and a law enforcement officer has the right to stop a vehicle for violating the law. (Tr. at 35-36.)

In recognizing that a statutory violation alone is sufficient particularized suspicion for a stop, the district court stated: “The Court easily concludes that these two wide turns alone establish objective data from which Officer Ray could infer and investigate a violation of Montana’s highway traffic safety laws. These inferences established a particularized suspicion to stop [Cockrell’s] vehicle on July 18, 2009.” (App. A at 6.) The district court’s finding was not clearly erroneous. Cockrell’s violation of Mont. Code Ann. § 61-8-321 provided

¹ Montana Code Annotated § 61-8-321 list exceptions, but none of them are applicable here.

Officer Ray with the necessary particularized suspicion to conduct an investigative traffic stop of his vehicle. Thompson, ¶ 12; Schulke, ¶ 16.

Moreover, the district court correctly observed that Cockrell's overly cautious stopping in the middle of two intersections buttressed the conclusion that Officer Ray had particularized suspicion to stop Cockrell's vehicle. (App. A at 6.) As the district court explained: "While [Cockrell's] stops in the middle of the intersections--in and of themselves--violated no law, these stops were properly considered by Officer Ray in the context of Cockrell's driving actions that the officer observed. They form part of the totality of the circumstances." Id.

Cockrell argues that Officer Ray lacked the requisite particularized suspicion for stopping him for driving on the wrong side of the road in violation of Mont. Code Ann. § 61-8-321. Cockrell claims that Officer Ray's observations of him driving on the wrong side of the road were subjective rather than objective observations because there were no markings or lines on the streets, and those subjective observations were insufficient to support a particularized suspicion to stop his vehicle. Cockrell's claim is unpersuasive. While lines marking the center of the road would have certainly made it easier for Officer Ray to determine if Cockrell was on the right side of the road way, Officer Ray did not need a line to see whether Cockrell was on the right half of the road when he made the two right hand turns. This is not a case where a driver slightly crosses over onto the other

half of the roadway while making a turn. On the first right hand turn, Officer Ray testified that Cockrell's vehicle fully crossed over into the opposite lane of traffic, touching the parking stalls on the side of the road. (Tr. at 5, 16.) The video taken by Officer Ray's camera captures Cockrell's wide right hand turn. (Resp't Ex. 1.) The photographs introduced at the hearing by Cockrell show that one could easily determine if a vehicle was on the right or wrong half of the roadway upon completion of a right hand turn from Main Street onto Third Street. (Petr.'s Ex. A., photos 478 KB, 507 KB, 698 KB, 688 KB, 728 KB, 731 KB, 708 KB, and 694 KB.) As far as Cockrell's second right hand turn, Cockrell turned so wide that his vehicle was not only on the wrong side of the road, but also so far in the wrong lane of traffic that it almost touched the grass of a residential yard. (Tr. at 5-6; Resp't Ex. 1.) As the district court correctly recognized, "[r]egardless of whether there are painted center lines on the side streets in Stevensville a turn entirely into the other lane of traffic, absent a reasonable excuse, violates section 61-8-321, MCA." (App. A at 5.)

Cockrell questions Officer Ray's testimony that his tires almost touched the grass on the opposite of the roadway when he made his second right hand turn. Cockrell claims common sense dictates that Officer Ray would have to guess where the tires were on the road and Officer Ray could not have seen the tires on the left side of his vehicle. Cockrell supports his claim with no testimony from the

district court record. Cockrell's "common sense" allegation is insufficient to rebut Officer Ray's actual testimony that Cockrell's vehicle almost touched the grass on the opposite side of the roadway. Moreover, the State submits that as Officer Ray followed Cockrell's vehicle, he could see how close Cockrell's vehicle came to going off the road way and onto the grass. The district court referred to and relied on Officer's Ray testimony in its order in concluding that there was particularized suspicion for the traffic. (App. A at 6.) The district court obviously found Officer's Ray testimony credible. This Court should defer to the district court's judgment on the credibility of Officer Ray's testimony. State v. Billman, 2008 MT 326, ¶ 45, 346 Mont. 118, 194 P.3d 58.

Cockrell claims that his wide turns into the opposite lane of traffic were routinely made by other drivers and justified because the narrow streets of Stevensville make it impossible to turn entirely within one's own lane. Officer Ray disputed Cockrell's claim. Officer Ray stated that people do not tend to make wide turns on Stevensville's back roads. (Tr. at 21.) Moreover, Cockrell's own photographs of the intersection of Main Street and Third Street refute Cockrell's claim that the narrowness of Third Street caused him to travel off the right hand of the road way and into the opposite lane. The photographs show that there was clearly enough road for Cockrell to stay on the right half of the roadway when he made the right hand turn off Main Street and onto Third Street. (Petr.'s Ex. A.,

photos 478 KB, 507 KB, 698 KB, 688 KB, 728 KB, 731 KB, 708 KB, and 694 KB.) Finally, while a narrow street might cause a driver to turn slightly onto the opposite lane of traffic, Cockrell did more than slightly cross over to the other lane. His entire vehicle was out of the right half of the roadway and into the opposite lane of traffic. On the second right hand turn, Cockrell turned so far onto the opposite side of the roadway that his vehicle almost touched the grass on the side of the road.

Under the totality of the circumstances present in this case, Officer Ray had the requisite particularized suspicion to stop Cockrell's vehicle. Cockrell has not overcome the presumption of correctness accorded the suspension of his driver's license and has not met his burden to show that the State's action was improper.

CONCLUSION

This Court should affirm the district court's order denying Cockrell's petition for reinstatement of his driver's license.

Respectfully submitted this 31 day of March, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: 

MICHEAL S. WELLENSTEIN
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. David E. Stenerson
Stenerson Law Office, P.C.
P.O. Box 2105
Hamilton, MT 59840-2105

Mr. Jeffrey B. Hays
Stevensville City Attorney
716 South First Street
Hamilton, MT 59840

DATED: March 31, 2010 Michael Wellenstein

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

Michael Wellenstein
MICHEAL S. WELLENSTEIN